IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 2, 2009 Session

ELLEN JANE SIMON BARNETT v. ROBERT LYNN BARNETT

Appeal from the Law Court for Washington County
No. 25626 Thomas J. Seeley, Jr., Judge

No. E2008-02679-COA-R3-CV - FILED FEBRUARY 26, 2010

Ellen Jane Simon Barnett ("Wife") initiated this litigation by filing her complaint for divorce from Robert Lynn Barnett ("Husband"). Husband answered and coupled it with a counterclaim for divorce. By agreement, Wife was allowed to amend her complaint to add allegations that a trust created by Husband during the marriage was null and void and to add Karen Lewis, in her capacity of trustee, as a party defendant. On February 19, 2008, again by agreement of the parties, the trial court entered a judgment of divorce, certified as final pursuant to Tenn. R. Civ. P. 54.02, reserving ruling on all other issues. Shortly thereafter, the court granted a motion filed by Wife to declare that the trust was void *ab initio*, and that any property held in the name of the trust would be treated as the property of one or both of the parties. The court referred all property and child support issues to a special master who held an evidentiary hearing and issued a report and recommendation. Both parties lodged objections to portions of the special master's filing. On August 28, 2008, the trial court entered a judgment dealing with all property issues and incorporating a permanent parenting plan. On September 25, 2008, Husband, then proceeding pro se, filed a motion for new trial in which he re-argued almost every issue in the case. In an order filed November 6, 2008, the trial court denied Husband's motion for new trial, and ruled on other matters related to contempt of Husband and enforcement of the judgment. On December 4, 2006, Husband filed his notice that he was appealing from the judgment of "11/6/08." Wife asks that we find the appeal to be frivolous and charge Husband with her attorney's fees. We affirm the judgment of the trial court, and award Wife her reasonable attorney's fees and expenses for defending a frivolous appeal.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Law Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the Court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Robert Lynn Barnett, Johnson City, Tennessee, appellant, Pro Se.

Judith Fain, Johnson City, Tennessee, for the appellee, Ellen Jane Simon Barnett.

OPINION

I.

A.

The parties separated just a few days short of their twentieth year of marriage. Two children were born to their union, only one of which, Calop, was a minor at the time of the divorce. Calop was 16; he resisted visitation with Husband. At the time of the marriage, Husband owned a Budget Car Rental franchise and Wife was a practicing CPA. Both worked for at least most of the duration of the marriage and they accumulated considerable assets. The list of assets is lengthy, filling 37 pages in the appendix to Husband's brief, with a list of 467 items. Although the list goes to the detail of pens and pencils, the primary focus in this appeal is on the real estate and the earning ability of Husband and Wife through their respective businesses. The only way we can make manageable sense of this appeal is to focus on those things and the trial court's disposition as to each, in light of the total universe of assets and liabilities.

B.

Shortly after the marriage, Wife left the partnership with which she was practicing as a CPA and established her own independent practice in a building then owned by Husband on Lamont Street in Johnson City. She also had an office built in the home for the long hours of the tax season. Although Husband claimed to have paid the utilities on the office space in support of Wife's practice, Wife paid rent from her practice to Husband on the office space "most of the time." Wife started the new practice with her list of clients and $20,000 in accounts receivable that was her share from the partnership. She valued her business at less than $1,500 at the time of the divorce. Her reasons for the low valuation were that she does it all and the business is worth nothing except for her labor. She has no employees, no accounts receivable, and she cannot sell her list or book of clients. The fair market value of the business, according to Wife, is the value of the used office furniture. Husband did not offer independent proof of the value of Wife's practice. He asks us in this appeal to impute a value based on its ability to generate approximately $50,000 income per year as established in the child support worksheet that is in the record. Husband argued to the trial court that Wife's evaluation should not be trusted because she keeps two sets of books. Wife's

explanation was that she keeps her client information and payment history on note cards, but does the actual accounting work on standard computer format. Both the special master and the trial court awarded the CPA business to Wife "free and clear" of any claims of Husband.

C.

Husband's car rental business, Barnett Leasing, had largely ceased to exist by the time of the divorce but did have substantial assets, most of which Husband had sold by the time of the judgment. Barnett Leasing was awarded to Husband "free and clear" of any claims of Wife. The trial court noted that it had considered those assets in making its equitable distribution of property.

The trial court did not impute income to Husband based on the car rental business, but did find that Husband was making $3,000 per month and that anything less than $3,000 per month constituted underemployment. The trial court based its findings on real estate rental income of approximately $28,000 per year and wages of $11,000 working at a liquor store. Husband challenges the trial court's findings by resort to his 2008 tax records which he argues show his actual income to be different from the findings of the trial court. Husband does not state the amount of income he claims in his statement of facts, but the documents he references account for income of approximately $20,000. However, the 2008 tax records were not before the trial court at the time it ruled on Husband's motion for new trial.[1] We note, however that even with the 2008 tax records in the record, the trial court found no ground for changing the child support.

D.

During the marriage the parties lived in a home on Knob Creek Road, Johnson City. Husband owned the Knob Creek property at the time of the marriage. It was worth $75,000 then and was encumbered with a mortgage securing a loan of $21,986.82. At the time of the divorce, the home was worth $157,200 with no mortgage. At trial there was testimony that the parties both invested their time and money to make extensive renovations to the marital home. The trial court awarded Husband the marital home as his property, subject to satisfaction of an overall monetary adjustment for Wife, but awarded Wife one-half the

[1]The 2008 tax records were submitted in support of a motion heard after the trial court's order on the motion for new trial. The trial court ordered that anything designated by the pro se litigant be included in the technical record, but we are not deciding issues that ripened after the trial court's order on the motion for new trial. That is what we must, under the Tenn. R. App. P. and in our role of a court of appellate jurisdiction, treat as the final judgment at issue in this appeal.

increase in value during the marriage ($82,200), plus one-half the value of debt retired during the marriage ($21,986.82).

E.

At the time of the marriage, Husband owned a rental building on Lamont Street in Johnson City. It was worth approximately $52,200 when the parties married with a mortgage of $6,800. At the time of the divorce it was worth $115,000 according to Wife's real estate appraisal expert. There was proof at trial that Wife took out a loan toward renovations on the property and that both parties worked and contributed money toward maintaining and upgrading the Lamont Street property. The trial court treated the Lamont Street rental property the same as the marital home, awarding it to Husband subject to Wife's overall monetary claim, but awarding Wife one-half the increase in value, the one-half being $31,400, plus $3,400, representing one-half of the decrease in the indebtedness.

F.

During the marriage Husband purchased property on Market Street in Johnson City, and titled it in his name. The trial court found that the Market Street property was a marital asset. Since the property was generating rental income, the court ordered that until the property was sold rental proceeds be applied to indebtedness and taxes. The court ordered that the Market Street property be sold, either by realtor or public auction, and that the proceeds be used first to satisfy certain administrative expenses and then as follows:

> . . . The remaining balance of the proceeds shall be divided into two (2) equal portions. [Wife] shall receive as her share of the proceeds from the Market Street property sale one (1) of the two portions. Additionally, . . .
>
> [F]rom [Husband]'s share of the proceeds of the sale of the Market Street property, and if necessary, from the sale of the other real property as outlined below, [Wife] shall be paid . . . $131,496.32. . . calculated as set forth below.
>
> a. 1/2 increase in value of Knob Creek Road during marriage (1/2 x $82,200.00) $41,100.00
>
> b. 1/2 of the mortgage balance on the Knob Creek property paid during marriage (1/2 x $21,986.82) $ 10,993.41

c. 1/2 increase in value of Lamont St. Property during marriage (1/2 x $62,800.00)	$ 31,400.00
d. 1/2 of the mortgage balance on the Lamont St. property paid during marriage (1/2 x $6,800.00)	$ 3,400.00
e. 1/2 cash realized from the sale of the Hillcrest property (1/2 x $51,443.33)	$ 25,721.66
f. 1/2 value of South Carolina property (1/2 x $10,000.00)	$ 5,000.00
g. 1/2 difference between value of personal property [Husband] is receiving ($22,608.00) and has received from the sale of the car hauler, ($5,653.00), the roll-back truck ($7,000.00) and the trailer ($1,000.00) and the value of personal property [Wife] is receiving ($12,242.00) ($36,261.00 - $12,242.00 = $24,019.00 x 1/2)	$ 12,009.50
h. Value of silver [Wife] was to have received	$ 6,000.00
i. Value of other missing personal property [Wife] was to have received	$ 300.00
j. Child support [Husband] owes from November 2006 through June, 2008 ($498.00 x20)	$ 9,960.00
k. Reimbursement to [Wife] for health-related services and prescriptions she paid for the parties' younger son ($535.00 x 1/2 = $267.50 plus $36.50 x 1/2 = $18.25)	$ 285.75
l. Reimbursement for medical insurance check cashed by [Husband] which should have been paid to [Wife]	$ 76.00
SUB-TOTAL	$146,246.32

There is to be subtracted from the One Hundred Forty-six Thousand Two Hundred Forty-six Dollars and thirty-two cents ($146,246.32) one half (1/2) of the difference between the value of [Husband]'s retirement benefits, Four Thousand Five Hundred Dollars ($4,500.00) and the value of [Wife]'s marital IRA, Thirty-four Thousand Dollars ($34,000.00): $34,000.00 - $4,500.00 = $29,500.00 x 1/2 = $14,750.00

$146,246.32	- 14,750.00
TOTAL TO BE PAID TO [WIFE]	$131,496.32

(Paragraph numbering omitted.)

G.

During the marriage, Husband acquired a property from his siblings on Hillcrest Street, Johnson City. Husband took title in the name of the Robert Lynn Barnett Trust. He sold the Hillcrest property while the divorce action was pending for $58,000. The trial court held that the trust was void and treated the property as a marital asset of which Wife should have received one half the net proceeds, those net proceeds totaled $51,443.33.

H.

Husband also purchased some property in South Carolina in the name of the trust during the marriage. He stipulated during the trial that the property was a marital asset. It was valued at $10,000. The trial court held that the property was a marital asset, but would be awarded to Husband with Wife to receive $5,000 for her part from the sale of other properties.

I.

During the marriage, the parties signed a document styled the "Robert Lynn Barnett Trust Agreement" with Wife signing as trustee and Husband as the grantor. The trust obligated the trustee to "pay to the Grantor such amounts of net income and principal from the trust estate as the Trustee deems in his sole discretion is necessary for the health, support, and maintenance of the Grantor . . . ." The trust gave the grantor power to relieve the trustee and appoint a substitute with "10 days notice." While the divorce was pending Husband terminated Wife as trustee and appointed his niece, Karen Lewis. Wife testified that Husband told her the trust would protect their assets from creditors. She also testified that

despite anything the document said, Husband controlled the property. He determined who rented the property and for how much. After he terminated Wife as the trustee, he received the bank statements directly. Wife testified that in her practice she does not form or do tax work for trusts. The properties titled in the name of the trust were the South Carolina property, which Husband stipulated was marital property, the Hillcrest Street property, the Lamont Street Property and the marital home on Knob Creek Road.

The trial court held that the trust was a "self-settled spendthrift trust [that was} void *ab initio*." The court based its ruling on its findings, after an evidentiary hearing, that "the evidence is uncontradicted that while [Wife] was 'Trustee' the funds received by the 'Trust' were spent in a manner directed by the beneficiary, Robert Lynn Barnett and that the current 'Trustee' has never denied the beneficiary the right to determine how the[] trust income was spent."

J.

The trial court's findings were impacted by its determination that Husband was not a credible witness regarding the whereabouts of approximately $6,000 worth of sterling silver that Wife claimed as her separate property. Wife's mother testified that she gave the silver to her daughter as a present. Wife testified that she tried to take the silver on several occasions but that Husband refused to let her have it. On one occasion, according to Wife, she had Husband initial a note indicating his refusal. The note was made a trial exhibit. Wife's sister testified of a run-in with Husband in which he told her that she could take the silver, but only if she emptied all Wife's belongings out of the house. As the sister was attempting to do that, Husband sent her a text message stating "don't come back." Husband admitted removing the silver to another location, but claimed that on the date Wife came for an inventory of her possessions, he had brought it back and Wife took it. Wife adamantly denied taking the silver. The special master specifically found that Husband's testimony was not credible, and the trial court adopted the special master's finding. It should be noted that Husband showed a willingness in this litigation to dispose of assets despite the statutory injunction against disposition of assets. He sold several of the assets of his rental business and one piece of real property in defiance of the statutory status quo injunction.

The court found Husband in willful contempt of court for making derogatory comments about Wife to the minor son, Calop. Also, the court conditioned Husband's parenting time "upon son's willingness to be with Father." The court calculated child support based on Calop staying with Husband 30 days per year, but stated "the Court recognizes [30 days] is more time than the child actually spends or has spent with Father since November, 2006."

K.

The best indication of the trial court's methodology is found in its transcribed memorandum opinion. All told, the trial court found, consistent with the special master's finds, total marital assets of $764,329, and total marital debts of $427,468, leaving net assets of $336,861. The trial court noted that Husband had been allocated "in hand assets worth $178,094" whereas Wife had received only $46,282 leaving the need for a monetary adjustment to be made from the sale of the Market Street and possibly other properties. The court noted an additional $25,000 in marital debt that Wife had incurred on a line of credit to be satisfied out of the properties to be sold. Then the trial court stated that Wife would receive a monetary adjustment for her one-half of the appreciation of property, plus an amount "to equalize their shares." "[T]hat should put them up basically fifty-fifty on what's left [of] the assets." The figures and methodology employed in the memorandum are substantially the same as set forth in the court's written order of August 28, 2008, which we have quoted at length. With two limited exceptions, one being Husband's income and the other being the treatment of more of the debt as the marital debt to be born equally, the trial court adopted the findings of the special master.

L.

On September 25, 2008, Husband filed pro se a motion pursuant to Tenn. R. Civ. P. 59 for a "New Trial by Jury" or to alter or amend Judgment raising a host of issues. The trial court denied the motion in an order filed November 6, 2008. Husband filed his notice of appeal on December 4, 2008, identifying as the judgment being appealed the order dated November 6, 2008. This court notes that the parties continued to file motions and the trial court continued to enter orders, despite this appeal, after November 6, 2008. Most of the issues raised and disposed of post-appeal appear to be issues relating to contempt and enforcement of the judgment, but since the notice of appeal does not relate to those matters and is not effective to put them at issue in this court, we are not ruling on anything that happened after November 6, 2008.

II.

Husband raises the following issues on appeal which we rephrase to capture the essence of Husband's concerns:

> Whether the trial court based child support on an incorrect income for Husband.

> Whether the trial court violated Husband's due process rights in entering a judgment of absolute divorce, without contemporaneously establishing a parenting plan.
>
> Whether the trial court erred in finding the trust agreement void, and, alternatively, whether the trial court should have treated the trust agreement as a valid post-nuptial agreement that controlled the designation and allocation of real property.
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> Whether Wife's CPA business was undervalued.
>
> Whether the trial court erred in its division of marital assets.
>
> Whether Husband was denied effective assistance of counsel.

Wife raise no issues other than her request that we find Husband's appeal frivolous and order him to pay her attorney fees incurred in this appeal.

III.

We review the trial court's findings of fact *de novo*, with a presumption that they are correct unless the preponderance of the evidence is against those findings. Tenn. R. App. P. 13(d); ***Cross v. City of Memphis***, 20 S.W.3d 642, 644 (Tenn. 2000). However, this standard is modified when the factual findings are made by the trial court's reference to a special master and subsequent adoption of the special master's findings; we must affirm the factual findings if there is material evidence to support the trial court's adoption of the special master's findings. ***Gammo v. Rolen***, 253 S.W.3d 169, 174 (Tenn. Ct. App. 2007); See Tenn. Code Ann. § 27-1-113 (2000). There is no presumption of correctness regarding the trial court's conclusions of law. ***Kendrick v. Shoemake***, 90 S.W.3d 566, 569 (Tenn.2002); ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn.1996). In ***Farnham v. Farnham***, No. E2008-02243-COA-R3-CV, 2009 WL 5125123, at *3 (Tenn. Ct. App. E.S., filed December 29, 2009), we noted the following:

> The issues raised on appeal with respect to division of property . . . involve subjects addressed to the sound discretion of the trial court. ***Batson v. Batson***, 769 S.W.2d 849, 850 (Tenn. Ct. App. 1988); ***Fisher v. Fisher***, 648 S.W.2d 244, 246 (Tenn. 1983); ***Aaron v. Aaron***, 909 S.W.2d 408, 410 (Tenn. 1995). "[A]n appellate court should find an abuse of discretion when it appears that a trial court applied an incorrect legal standard, or

> reached a decision which is against logic or reasoning that caused an injustice to the party complaining." ***State v. Shuck***, 953 S.W.2d 662, 669 (Tenn. 1997) (citing ***Ballard v. Herzke***, 924 S.W.2d 652, 661 (Tenn. 1996)).

We accord great weight to the trials court's division of the property, especially when that division involves issues of credibility and weighing of testimony. ***Keyt v. Keyt***, 244 S.W.3d 321, 327 (Tenn. 2007). A trial court's finding as to a non-custodial parent's income which differs from the special master's finding as to that parent's income is a factual finding that we review to "ascertain whether the preponderance of the evidence weighs against the Trial Court's finding." ***Pruett v. Pruett***, No. E2007-00349-COA-R3-CV, 2008 WL 182236 at *6 (Tenn. Ct. App. E.S., filed January 22, 2008) (citations omitted).

IV.

A.

We begin with the issue of the trust because several of the other issues are interrelated. For example, in Husband's argument concerning his income, he omits rental income to the trust. Husband's argument is not a model of clarity. We perceive the thrust of the argument to be contained in the statement, "[Wife] signed and participated in preparation of the agreement it self, prepared deeds, collected, deposited, signed leases, and set rent amounts and paid rent to the Trust from her own CPA business, filed and signed all tax returns and made decisions of her own knowledge as a CPA on tax preparation . . ." The main problem with the argument is that it ignores the trial court's findings based on evidence the court characterizes as uncontradicted "that while [Wife] was 'Trustee' the funds received by the 'Trust' were spent in a manner directed by the beneficiary." Husband points us to nothing in the record to contradict the trial court's findings other than perhaps some documents that purport to create the trust. In light of Wife's explanation that trusts were not what she handled in her local CPA practice and her explanation that Husband told her that he wanted to create the trust to protect the assets from creditors, her signature on a document does not amount to a preponderance of evidence against the trial court's findings. This is especially true given Husband's lack of credibility on other property issues. Accordingly, we hold that the trial court did not err in holding that the trust was ineffective to insulate the property from the marital claims of Wife. *See* ***McArthur v. Faw***, 193 S.W.2d 763, 768 (Tenn. 1946); ***Waldron v. Commerce Union Bank***, 577 S.W. 2d 669, 674 (Tenn. Ct. App. 1978).

Alternatively Husband argues that the document is a post nuptial agreement, citing Tenn. Code Ann. § 36-3-504 and "***Shenauda v. Shenauda***, 1995 App. Lexis 748." The statute deals with the removing the ancient common law disability of women to own and

control property. It has nothing to do with this case. ***Shenauda*** is Husband's misspelling of ***Shenouda v. Shenouda***, No. 03A01-9505-CV-00151, 1995 Tenn. App. LEXIS 748 (Tenn. Ct. App. E.S., filed November 20, 1995). In ***Shenouda***, Husband had created a valid trust using marital assets for the benefit of the children's education. The beneficiaries were the children. ***Shenouda*** did not involve a person creating and controlling a trust for his own benefit. Moreover, as Wife points out, this argument was not made to the trial court and cannot be raised for the first time on appeal. ***In Re Sentinel Trust Co.***, 206 S.W.3d 501, 528 (Tenn. Ct. App. 2005).

B.

We turn now to Husband's argument that the trial court did not correctly and legally calculate child support. The argument is premised entirely upon a supposed miscalculation of income and not upon misinterpretation and/or application of the Child Support Guidelines. Husband's argument is that his 2008 tax documents, being a form 1099 and his form 1040, show less income than the trial court's finding, made in 2008, concerning his income level in 2008. As we have previously observed, these documents were not before the trial court when it filed the order on November 6, 2008, denying the motion for new trial. Therefore, we will not reverse the trial court's factual findings on the basis of such later-filed documents. Also, we are advised by Wife that the reason the tax figures are down from income as found by the trial court is that Husband reported income only from the Market Street property and did not claim income on the "trust" property that the trial court determined belonged to Husband. We also note that even if we were inclined to consider the tax documents, when the trial court did make its rulings with the documents in front of it, the court did not find a material change in income so as to justify a change in child support. In short, the evidence does not preponderate against the trial court's finding that Husband had income of $3,000 at the time of trial. In fact, we are inclined to believe that the trial court gave Husband the benefit of every doubt in determining his income to be $3,000 per month instead of the higher figure found by the special master.

C.

Next we address Husband's argument that the trial court should have treated Wife's business as a marital asset and assigned it a higher value than the approximate $1,500 as testified by Wife. In ***Farnham***, we note the following pertinent principles:

> Dividing marital property is not a mechanical process but rather is guided by carefully weighing the relevant factors in Tenn.

Code Ann. § 36-4-121(c)(2005).[2] ***Flannary v. Flannary,*** 121 S.W.3d 647, 650-51 (Tenn. 2003); ***Tate v. Tate,*** 138 S.W.3d 872, 875 (Tenn. Ct. App. 2003). As previously noted herein, [T]rial courts have broad discretion in fashioning an equitable division of marital property. ***Jolly v. Jolly,*** 130 S.W.3d 783, 785

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[2]The statute sets out the relevant factors as follows:

> (1) The duration of the marriage;
>
> (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
>
> (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
>
> (4) The relative ability of each party for future acquisitions of capital assets and income;
>
> (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
>
> (6) The value of the separate property of each party;
>
> (7) The estate of each party at the time of the marriage;
>
> (8) The economic circumstances of each party at the time the division of property is to become effective;
>
> (9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
>
> (10) The amount of social security benefits available to each spouse; and
>
> (11) Such other factors as are necessary to consider the equities between the parties.

> (Tenn. 2004); ***Fisher v. Fisher,*** 648 S.W.2d 244, 246 (Tenn. 1983), and appellate courts must accord great weight to a trial court's division of marital property, ***Wilson v. Moore,*** 929 S.W.2d 367, 372 (Tenn. Ct. App. 1996). It is not this court's role to tweak the manner in which a trial court has divided the marital property. ***Morton v. Morton,*** 182 S.W.3d 821, 834 (Tenn. Ct. App. 2005). Rather, our role is to determine whether the trial court applied the correct legal standards, whether the manner in which the trial court weighed the factors in Tenn. Code Ann. § 36-4-121(c) is consistent with logic and reason, and whether the evidence preponderates against the trial court's division of the marital property. ***Jolly,*** 130 S.W.3d at 785-86.

2009 WL 5125123, at *10 (footnote in original).

As we read the findings of the special master and the trial court, we believe they both treated the car rental business of Husband (Barnett Leasing) as well as the CPA business of Wife as marital assets, but then, given the impracticality of trying to sell Wife's business, or make her pay Husband one-half the value by way of cash or offset, simply allocated each party the appropriate business "free and clear of any claims" by the other party. One reason this was especially appropriate is that Husband had already sold and pocketed most, if not all, of the assets of Barnett Leasing. The trial court was careful to note that it considered these assets in making its distribution of property.

As to the value of the CPA business, Husband wants us to do what he did not do at trial. Husband filed a motion asking the trial court to allow his expert to appraise the CPA business, and the trial court allowed the appraisal but set time constraints which Husband did not meet. He now faults the trial court for not assigning a value based on an income stream, and wants us to do the same. We are not experts at such evaluations and even if we were, our testimony was not before the trial court. The trial court had before it the testimony of Wife which it obviously credited over the testimony of Husband who was not believable concerning other matters. We also note the trial court's handling of the matter of the CPA business is consistent with the special master's. As we have previously noted, the concurrence of the trial judge with the special master virtually insulates the factual findings from reversal. There is material evidence to support the court's treating of the CPA business as the rough equitable equivalent of Husband's leasing business that he had liquidated during the course of the divorce in what appears to be a violation of the statutorily-imposed injunction.

D.

Husband purports to challenge the division of property, but then states that he "simply request[s] this Court to read and compare and determine what was ruled in this case, [based on] the 3 documents and only the following 3 documents." He refers to the report and recommendation of the special master, the transcript of a later hearing before the trial court, and the judgment entered August 28, 2008, dividing the property. With regard to the marital home, for example, Husband argues that the special master, in the first instance, ordered it sold; then the trial court said it was not to be sold; and then, finally, the judgment ordered it sold. Husband also complains that the trial court gave counsel notes concerning its division of property, which notes did not become part of the record. We do not see the conflict that Husband tries to misread into the technical record. The fact that the trial court may have failed to address each of 300 plus items of property by name in the hearing transcript does not concern us in the least. Nor are we bothered by the fact that the trial court gave counsel for the parties notes from which to prepare a judgment. Better practice might have been to make the notes an exhibit to the transcript, but we know of no rule that requires every scrap of paper to be made a part of the technical record. To the extent Husband or anyone in his camp is able to read some conflict or ambiguity into the documents, they are to no avail. The judgment is controlling over recommendations of special masters and observations made in transcripts. The trial court clearly adopted the findings of the special master with regard to real property values and the final disposition of that property. Husband is to receive the Knob Creek property, subject to satisfaction of the monetary adjustment made in favor of Wife in the judgment. If the Market Street property satisfies that claim, then the Knob Creek property is Husband's free and clear. The final tally pursuant to the judgment must await the sale of certain properties. We hold that material evidence supported the trial court's judgment, and the allocation and disposition of the property was consistent with logic and reason. Husband's argument regarding the property division is without merit in either fact or law. His request that we interpret the judgment for him is frivolous.

E.

The next issue we address is whether the trial court violated Husband's due process rights in putting down a judgment of absolute divorce in February 2008 without a contemporaneous parenting plan. The only authority cited by Husband is Tenn. Code Ann. § 36-6-404 (2005) which does state, that "[a]ny final decree . . . for absolute divorce . . . involving a minor child shall incorporate a permanent parenting plan . . ." If we treat the February 2008 "Judgment of Divorce" as a "final decree" then we have the problem that Husband did not file his notice of appeal until December 4, 2008. This would mean his appeal is untimely and ineffective to challenge the "Judgment of Divorce." On the other hand, if we treat the "Judgment" as an interim order that became final at a later date and a

proper subject for this appeal, then the judgment only became final with the denial of the motion for new trial in November. By that time, there was a permanent parenting plan in place that was filed in August. Accordingly, we find no merit to the argument that Husband's due process rights were violated by the delay in putting down a permanent parenting plan.

F.

The final argument made by Husband is that he was denied effective assistance of counsel. He argues that his second attorney failed to notify him of a hearing, but as to the first attorney, Husband admits that he refused to "return to the office of first counsel" which then prompted counsel to withdraw. We note that Husband has not furnished evidentiary support of his first claim, such as the attorney's affidavit or deposition. We are not particularly inclined to take all his self-serving assertions at face value. More importantly, this court has held that "as a general rule, . . . in civil cases relief may not be premised upon the theory of ineffective assistance of counsel . . . ." ***Thornburgh v. Thornburgh***, 937 S.W.2d 925, 926 (Tenn. Ct. App. 1996). Husband's argument, based on vague accusations and an admission that he refused to go to his first attorney's office, demonstrate that this is not the case "where the facts are so egregious that justice . . . require[s] some relief." ***Id***. Accordingly, we hold that there is no merit in Husband's argument.

V.

We turn now to the issue raised by Wife of whether she should be awarded the fees incurred in responding to a frivolous appeal. We are authorized by Tenn.Code Ann. § 27-1-122 (2000) to award "damages" including fees and expenses to a party forced to respond to a frivolous appeal. The statute states:

> When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

Id. A frivolous appeal is one that is " 'devoid of merit,' ... or one in which there is little prospect that it can ever succeed." ***Industrial Dev. Bd. of Tullahoma v. Hancock***, 901 S.W.2d 382, 385 (Tenn.Ct.App.1995) (*quoting* ***Combustion Eng'g, Inc. v. Kennedy***, 562 S.W.2d 202, 205 (Tenn.1978)). We have progressed through the issues raised by Husband without finding any basis either in the facts or the law that come close to requiring a reversal

or modification of the judgment entered by the trial court. In short, the appeal is devoid of merit. "Parties should not be forced to bear the cost and vexation of baseless appeals." ***Young v. Barrow***, 130 S.W.3d 59, 66 (Tenn.Ct.App.,2003)(*citing*, *e.g.*, ***Davis v. Gulf Ins. Group***, 546 S.W.2d 583, 586 (Tenn.1977)). Accordingly, we award reasonable attorney fees and expenses that Wife incurred in defending this appeal. The reasonable amount of these fees and expenses will be determined by the trial court on remand.

VI.

The judgment of the trial court is affirmed. Cost on appeal are taxed to the appellant Robert Lynn Barnett. The case is remanded, pursuant to applicable law, for determination and award of the reasonable attorney's fees and expenses of Wife incurred on appeal and for collection of costs assessed below.

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CHARLES D. SUSANO, JR., JUDGE